IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 787 of 2005

WITH

CIVIL APPLICATION NO. 889 OF 2005

Kesu Yesu Tapkir (since deceased
through one of the LRs Jaiwantibai
Mahadeo Korde .. Appellant

versus

M/s.Amit Enterprises and ors. .. Respondents

...

Mr.V.A. Thorat, Sr.Counsel with Shri S.N. Chandrachud for the appellants.

Mr.Y.S. Jehagirdar, Sr.Counsel with Shri P.S. Dani for respondent no.1.

Mr.P.K. Dhakephalkar with Shri Jaydeep S. Deo for respondent nos.4 to 9.

Shri G.S. Godbole for respondent nos.10 to 15.

Mrs.Geeta Mulekar, Govt. Pleader for respondent no.16.

CORAM : B.H. MARLAPALLE,J

ORDER RESERVED ON: 16th Sept,2005

ORDER PRONOUNCED ON:27th Sept,2005

P.C.:

1. Heard Mr.Thorat, the learned Sr. Counsel with Mr.Chandrachud for the appellant, Mr.Jehagirdar, learned Sr. Counsel with Mr.Dani for the respondent no.1, Mr.Dhakephalkar with Mr.Jaydeep Deo for the respondent nos.4 to 9, Mr.Girish Godbole for respondent nos.10 to 15 and Mrs.Mulekar, Govt. Pleader of respondent no.16.

2. This appeal arises from the order dated 8th July 2005 passed by the learned 7th Jt. Civil Judge, Sr. Division, Pune dismissing the application at Exhibit-5 for temporary injunction filed in Special Civil Suit no.255 of 2004.

3. Kesu Tapkir had entered into an agreement with late Digambar, son of Dattatraya Deshpande on 10th July 1964 and it was agreement for sale in respect of agricultural land admeasuring 6 acre and 29 gunthas from Survey No.61 of Village Parvati, Taluka Haveli. Late Shri Digambar Dattatraya Deshpande had agreed to sell the said land to Kesu Tapkir and his daughter Mrs.Shanta Mahadev Korde for a consideration of Rs.90,000/- and on signing of the said agreement, an amount of rs.10,000/- was paid to the land owner i.e. late Shri Digambar Dattatraya Deshpande.

4. Kesu Tapkir died in the year 1970 and before his death, the agreement dated 10th July 1964 was lastly extended on 17th January 1967 by late Shri Digambar Deshpande by receiving part consideration of Rs.4,000/-. Kesu Tapkir had two daughters viz. Shantabai and Jaywantibai and both of them were married to Shri Mahadeo Korde. Shantabai instituted a Special Civil Suit no.164 of 1997 which came to be subsequently re-registered as Regular Civil Suit no.3582 of 2000 for specific performance. However, on her demise, the suit came to be abated and no steps were taken by Jaywantibai or the son of

Shantabai to restore the said suit. Smt. Jaywantibai on the demise of her husband Mahadeo Korde filed Special Civil Suit no.255 of 2005 for specific performance of the agreement dated 10th July 1964. She contended that a public notice was issued by defendant no.1 and it was published in Daily Sakal on 11th December 2003 and from the said notice, she got the knowledge that the suit property was being acquired by the defendant no.1. She replied the said notice on 16th April 2003 and objected to the proposed transaction between the defendant no.1 on one hand and defendant nos.2 to 15 on the other hand. She also published a public notice in Daily Sakal on 16th January 2004 taking the objections to the proposed transaction based on the agreement dated 10th July 1964. The defendants had field their written statement/reply and opposed the suit as well as the application for temporary injunction. After hearing both the parties, the impugned order came to be passed.

5. Mr.Thorat, the learned Sr. Counsel submitted that the trial Court fell in manifest errors in holding that the plaintiff failed to make

out a prima facie case in her favour. As per Mr.Thorat, the defendant no.1 had the knowledge regarding the agreement dated 10th July 1964 and the claim of the plaintiff and other Legal Representatives of Kesu Tapkir and the claim made by the plaintiff in the main suit was not a frivolous claim or a claim made by an alien to the suit property. He further submitted that during the life time of Kesu Tapkir, land owner could not include the sale deed monthly because he could not obtain the necessary clearances from the revenue authorities and the step brother of the land owner filed a suit for partition which was registered as Special Civil Suit no. 69 of 1988. As per the plaintiff, the litigation in the said proceedings is still pending before this Court in Second Appeal no.638 of 1990 and thus, the landlord’s title to the suit property was not fully and clearly established. During the pendency of the Second Appeal, the defendant no.1 and other defendants have entered into agreements for transfer of the suit property inspite of the objections raised by the plaintiff. The learned counsel for the defendants, on the other hand have submitted that the agreement dated 10th July 1964 relied upon by the plaintiff had a limited tenure and

during the lift time of Kesu Tapkir, it was not renewed. On 16th August 1967, a public notice was issued through Advocate Shri D.V. Sohoni regarding the proposed transfer of the suit land and Kesu Tapkir or any of his LRs did not register any objection. Thus, they had the knowledge regarding the intentions of the land owners to transfer the suit land to some other party and even then Kesu Tapkir did not renew the agreement dated 10th July 1964 nor did he take any steps during his life time for specific performance of the said agreement. The defendants also rely upon the fact that the suit filed by Shantabai as Special Civil Suit no.164 of 1997 got abatted on her demise and if the present plaintiff wanted to exercise her claim, she herself or the son of Shantabai ought to have taken steps for restoration of the suit. In the impugned order, the learned Judge of the trial Court has noted that the points of abatement, limitation and maintainability of the suit could be decided after the parties adduced their evidence. The trial Court further noted that defendant nos.2 to 15 have entered into an agreement for transfer of the suit property. Initially, the memorandum of understanding was signed on 27th April 2003 and subsequently, development

agreement has been signed on 30th November 2003 for a consideration of Rs.10,22,40,000/- and in addition an amount of Rs.1,75,00,000/- has been paid to the tenants. The defendant no.1 has thus invested about Rs.16 crores including the amount of royalty paid to the State Government and the defendant nos.2 to 15 have handed over the possession of the suit land to the defendant no.1. The defendant no.1 thereafter has obtained all the clearances and has started construction on the suit land. The construction is in an advance stage. For all these reasons, there was no case made to grant the interim relief prayed for as per the trial court.

6. It is evident from the documents on record that the suit property was a subject matter of a suit for partition and the Second Appeal has been filed before this Court. The learned counsel for the defendants contended that the said Second Appeal has been decided in terms of the compromise. It appears that the compromise has been arrived at when the suit of the plaintiff filed on 18th February 2004 has been pending and Mr.Thorat pointed out that it was not to the knowledge of the plaintiff. The plaintiff is not in possession of any part of the suit property. At

the same time, her claim is in the knowledge of the defendants that is apparent from the recital of memorandum of understanding dated 27th April 2003 as well as the development agreement dated 30th November 2003. The recital of these documents refers to the dispute between the LRs of Kesu Tapkir and the original landlord, more particularly RCS no.3582 of 2000 (Old special Civil Suit no.164/97), the agreement dated 10th July 1964 etc. By way of temporary injunction, the plaintiff has prayed for restraining orders from alienating the suit property in any manner or raising any construction thereon or undertaking any development on the said land and/or from creating any third party interests. Admittedly, the construction has already started and thus, defendant no.1 has invested a huge sum. The reasoning given by the learned Judge of the trial Court in rejecting the application for temporary injunction does not appear to be perverse or illegal so as to interfere with the same in its entirety but taking into consideration the fact that the execution of the agreement dated 10th July 1964 is not disputed, the plaintiff cannot be denied a reasonable protection and such a protection should be in the interest of the third parties as well. At the same

time, it appears that the building permission has been granted after the suit was filed and the construction commenced is pendente lite.

7. The appeal is therefore disposed of by directing the defendant no.1 to file an undertaking before the trial Court that the construction in progress on the suit land shall be subject to the final decision in the suit i.e. RCS no.255 of 2004 and the defendant no.1 shall not claim any equity if the suit is decided against it. The defendant no.1 shall also undertake to inform to the third parties while transferring in any form any portion of the buildings to be constructed on the suit land, regarding pendency of the suit and that the construction shall be subject to the final decision therein. The undertaking shall be filed within one week from today before the trial court.

B.H. MARLAPALLE, J